PUBLIC PROSECUTOR

v.

YAP MEOW FAN

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[CRIMINAL TRIAL NO. 1 OF 1987]
10 APRIL 1990

CRIMINAL LAW: *Possession of firearms and ammunition under the Internal Security Act - Statement made to police leading to discovery of the incriminating exhibits - Whether admissible - Basis of the prosecution's case - Defence of denial - Credibility of accused.*

EVIDENCE: *Section 27 of the Evidence Act - Statement made to police leading to discovery of the incriminating exhibits - Whether admissible - Basis of the prosecution's case.*

The accused was charged on 3 counts of possession of firearms and ammunition under the Internal Security Act (ISA). The prosecution's evidence was based on information received when they went to a house occupied by the accused and arrested 3 persons including the accused. On the same day the police whilst keeping surveillance on the same house arrested another person who entered the same. The police made two searches at the times when the persons where arrested but did not find anything incriminating. The next day as a result of certain information given by the accused during interrogation of the accused, the police went back to the house together with the accused and from a cupboard in a room found the firearms and the ammunition. A tenant of the house (PW3) gave evidence that he was with the accused and a third person, the occupiers of the room and that anyone could have access to the room as the same was not locked. PW3 denied that the incriminating items were his.

The crucial evidence against the accused was the information he gave which the prosecution said led them to the discovery of the incriminating evidence and which they argued was admissible under s. 27 of the Evidence Act. The information said to have been given by the accused were "Saya boleh keluar itu barang".

At the end of the prosecution's case, the prosecution conceded that if these statements were not admissible then the prosecution had no case. The Court ruled that the statements were admissible and the defence was called. The defence was a denial by the accused of the possession of the incriminating exhibits.

Held:

[1] The various statements made by the accused to prosecution witness PW1 and recorded by him were admissible as information relating distinctly to the fact of the discovery of the incriminating items and indicated on a *prima facie* basis that the accused had possession of the two revolvers and ammunition by reason of his admission.

[2] On the totality of the evidence, the Court found the view that the accused was not a truthful witness and that the accused was in possession of the two revolvers and the ammunition as charged.

[Accused found guilty on all 3 charges. Convicted and sentenced to death.]

Cases referred to:

PP v. Liew San Seng [1982] 1 MLJ 223
Sum Kum Seng v. PP [1981] 1 MLJ 244
Lau Kee Hoo v. PP [1984] 1 MLJ 110

Legislation referred to:
Criminal Procedure Code, s. 425
Internal Security Act 1960, ss. 57, (1), (1)(a)
Evidence Act 1950 s. 27

For the public prosecutor - P.L. Tan, DPP
For the accused - Muthu; M/s. Muthu & Co.

JUDGMENT

LC Vohrah J:

There were three charges against the accused, namely:

1. That you on 7 December 1986 at about 3 a.m. at No. 52, Jalan Ledang, Tampoi, in the District of Johor Bahru, in the State of Johor, being a security area as proclaimed by the Yang di-Pertuan Agong (*vide* PU(A) 148 dated 15 May 1969) without lawful excuse did have in your possession a firearm, to wit, a revolver 0.38 Smith and Wesson - Serial Number 49741 without lawful authority and that you have thereby committed an offence under s. 57(1)(a) of the Internal Security Act 1960 (ISA) and punishable under s. 57 of the said Act.

2. That you on the same date, time and place being a security area as proclaimed by the Yang di-Pertuan Agong (*vide* PU(A) 148 dated 15 May 1969) without lawful excuse did have in your possession a firearm, to wit, a revolver 0.38 (Special CTG) Smith and Wesson Number 47241 B16 without lawful authority and that you have thereby committed an offence under s. 57(1)(a) of the ISA 1960 and punishable under s. 57 of the said Act.

3. That you on the same date, time and place, being a security area as proclaimed by the Yang di-Pertuan Agong *vide* PU(A) 148 dated 15 May 1969, without lawful excuse did have in your possession 13 rounds of ammunition, to wit,

(1) 7 rounds of 0.38 Special WW bullets

(ii) 4 rounds of 0.38 Winchester bullets

(iii) 1 round of 0.38 Special SPL WW bullets

(iv) 1 round of 0.38 RP SPL bullets without lawful authority and you have thereby committed an offence under s. 57(1)(6) of the ISA 1960 and punishable under s. 57 of the said Act.

The facts of the prosecution case briefly were as follows. On 5 December 1986 whilst ASP A. Paramasivam (PW1) was at his office he received certain information in consequence of which he gathered his men for the purpose of raiding a house at No. 52 Jalan Ledang, Taman Johor, Tampoi. On arrival at the address he found it to be a terraced ground floor corner house with a fence. As the gate was not locked the police party proceeded to the entrance of the house. The door was open but their passage was barred by a grilled door across the entrance. PW1 saw a man, one Goh You Tin, in the hall and called out to him. When Goh opened the grilled door, PW1, who was in mufti, identified himself as a police officer and handcuffed him. With him at the entrance at the time were Detective Corporal Mat Jan and DPC Rosman Awang. After arresting Goh the police shouted to the other occupants to come out whereupon one Low Kian Kwee and the accused came out of the second room in the house. PW1 also arrested them, PW1 then searched this room and other accessible parts of

the house but found nothing incriminating. He then proceeded to Tampoi Police Station with the three arrested persons and left them there in police custody. PW1 then returned to the house with his men to conduct a surveillance of the house from some stalls situated across the road in front of the house. At about 6.30 p.m. a male Chinese by the name of Peter Chay Kam (PW3) arrived at the compound of the house on a motorcycle. PW1 approached PW3 and spoke to him. After finding out that he was the sub-tenant of the second room PW1 decided not to arrest him. PW1 then returned to the stalls to continue his surveillance. At about 8.15 p.m. another male Chinese, one Hin Chin Fatt, entered the compound whereupon PW1 and his men came out of their surveillance positions and arrested him. They all entered the house and the police conducted a search of the first room occupied by Hin which they had earlier found locked during their initial search of the first room occupied by Hin which they had earlier found locked during their initial search of the house. The police found nothing in this room. PW1 then returned with his men to Tampoi Police Station together with Hin to fetch the other 3 arrested persons. The whole party then proceeded to the Central Police Station where the four arrested persons were sent to the lock-up. The next day, 6 December 1986, as a result of the interrogation of the accused PW1 received certain information from the accused at about 11 p.m. whereupon he mounted a police party and proceeded to Tampoi and from there to house No. 52 again. The door of the house was locked but after PW1 had knocked and identified themselves the wife of Hin let them in. The accused then led PW1 to the second room which at that time was being occupied by PW3 and his lady companion. The two occupants were told to come out and PW1 together with the accused, Corporal Mohd. Salleh Ghani (PW4), DPC Omar Yusof and police photographer Jeffrey Joshua (PW5) entered the second room. In consequence of what the accused said, PW1 found at the end of the slot of the right drawer (P9) of an almeirah (P3) two loaded revolvers (P5 and P7) each containing five bullets, and three loose bullets in a small newspaper wrapping (P8A-C). The two revolvers were lying in an inverted position against the back of the slot with the wrapping lying at the right corner of the slot. PW1 caused a photograph to be taken of these items by PW5 after which PW1 removed the revolvers from the slot one by one and also the small newspaper wrapping. He examined P6 and found it to be a .38 Smith & Wesson bearing Serial Number 49741 loaded with five bullets (P6A-E). He also examined P7 and found it to be a .38 Smith & Wesson (Special CTG) bearing Serial Number 47241 also loaded wit five bullets (P7A-E). PW1 also found in the slot of the left drawer of P3 two paper packages one containing motor-cycle number plates and the other driving licences and identity cards.

a *b* *c* *d* *e* *f*

These essential facts were adduced through the testimony of PW1. The evidence of Detective Corporal Mohd. Salleh bin Abdul Ghani (PW4) corroborated PW1's testimony relating to the information given by the accused as recorded by PW1 on a sheet of note paper (P2) and to the discovery of the incriminating exhibits in the second room.

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The two revolvers P6 and P7 and all the bullets were examined by ASP Taib bin Abdullah (PW2), an armaments officer, on 18 December 1986 and found to be in good serviceable condition.

Evidence was also adduced by the prosecution through Peter Chay Kam (PW3) to the effect that he was the actual sub-tenant of the second room and that the accused who was his employee also shared the room with him together with another employee of his. He admitted ownership of the almeirah P3 which he said he had built himself in 1978. He also stated that his room was never locked so that anybody could have had access to the room and to P3 but he denied that the revolvers and bullets recovered from the slot in P3 belonged to him or that he had any knowledge of them.

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At the end of the prosecution case the learned Deputy Public Prosecutor indicated that the crucial evidence upon which she relied for the charges against the accused was the information given by the accused consisting of statements made to PW1 leading to the discovery of the two revolvers and the thirteen bullets found in the slot of the right drawer P9. I had no reason to disbelieve at that stage that these statements were made by the accused to PW1. The first statement was that made by the accused at the end of the interrogation on 6 December 1986 when the accused said:

> Saya boleh kasi keluar itu barang.
> Saya simpan. Saya tahu.
> Kita pergi 3 pagi kerana sekarang banyak orang. Ada 2 barang.

The next statement, "Rumah Tuan tahulah," was made by the accused in answer to PW1's query as to their destination when the accused led the police party out of the police station in consequence of the first statement. The third statement was made by the accused after the party had proceeded to House No. 52 and entered the second room where PW1 asked the accused, "Mana itu barang?" and the accused replied, at the same time pointing with his head and handcuffed hands to P3: "Sana. Buka laci dulu." The last statement was made by the accused when PW1 after pulling out the right drawer at the bottom of P3 and discovering it to be empty said to the accused, "Jangan bohong" whereupon the accused replied: "Bawah laci ada kertas. Angkat keluar. Peluru dalam 3 luar." These statements of the accused were recorded by PW1 on P2, a sheet in his notebook, apparently on 6 December 1986 (at P2A) and the next day (at P2B) and led to PW1 discovering the two loaded revolvers and loose bullets behind a cardboard placed across the rear of the slot. The learned Deputy contended that the statements were admissible under s. 27 of the Evidence Act 1950 which reads:

> When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

She conceded that if these statements were not admissible the prosecution then had no case against the accused. Counsel for the accused in submitting that there was no *prima facie* case against the accused urged the Court to exclude the statements on two grounds, firstly, that they did not relate distinctly to the incriminating exhibits being **discovered** but in fact to their being recovered and cited the case of *PP v. Liew San Seng* [1982] 1 MLJ 223; and secondly, that, even if they were admissible on a *prima facie* basis, as there was evidence that the interrogation had been "rigid" and that the statements might not have been taken down contemporaneously, PW1's evidence relating to the statements was suspect and ought not to be relied upon and cited the case of *Sum Kum Seng v. PP* [1981] 1 MLJ 244. As regards the first ground I was of the view that the facts of the present case were distinguishable from those in *Liew Sang Seng's* case where the learned Judge held that there was evidence to suggest that the police must have known of the existence of the incriminating objects and that the police investigation was "attempting to turn an ordinary 'recovery' of incriminating exhibits into a 'discovery' in order to utilise the provisions of s. 27". As to the second ground I did not think (in the absence of any authority) that the question of the rigidity of the interrogation had anything to do with the question of admissibility under s. 27; nor did I think at the stage of the close of the prosecution case that I had to test the veracity of the statements made by PW1 and PW2 regarding the contemporaneousness of the information given by the accused during interrogation and in response to questions put to him. Further, I did not also think that *Sum Kum Seng's* case required the information leading to the discovery of the incriminating items to be recorded **contemporaneously** in order that

it could be admitted as reliable evidence. I took the view, having regard to *Lau Kee Hoo v. PP* [1984] 1 MLJ 110, and *Wai Chan Leong v. PP* (Supreme Court Criminal Appeal No. 84 of 1984), that the various statements made by the accused to PW1 and recorded by him on P2 were admissible as information relating distinctly to the fact of the discovery of the incriminating items and indicated on a *prima facie* basis that the accused had possession of the two revolvers and ammunition as charged by reason of his admission that he could take them out and his explanation: "Saya simpan. Saya tahu". I accordingly called upon the accused to make his defence.

The accused, aged thirty-eight, testified as follows. Until his arrest on 5 December 1986 he was employed as a shellac painter by PW3 who provided him with board and lodging in a rented room which PW3 shared with him and one Low Kian Kwee, another employee of PW3. On that day as he ran a fever he did not go to work and remained in the house at No. 52, Jalan Ledang. At about 1.00 p.m. a party of policemen raided the house. At that time there were three persons in the house and he and Low were in the second room. When he heard the police arrive he came out of the room with Low whilst the third person Goh You Tin was already seated on a sofa in the hall. They were all told to raise their arms which they did. It was he who let the policemen into the house whereupon they conducted a body search upon him and Low. When they found nothing they proceeded to the second room which was unlocked and conducted a body search upon him and Low. When they found nothing they proceeded to the second room which was unlocked and conducted a search therein. Then they searched the kitchen and the third room, at that time occupied by a woman, after kicking the door open. They also searched the toilet and backyard of the house. The only portion of the house they did not search was the first room in front because it was locked. Their search was fruitless. Before beginning the search of the house but after the body search he and the others had been asked, "Mana pistol?" He was then asked, "Did you go and rob just now?" and he replied no. The police also asked, "Where is the white crash helmet?" after conducting the search of the house. When none of them responded they searched again and found two white crash helmets and asked them to whom they belonged and all three replied that they did not know. He did not possess a motorcycle. The police then asked the three of them, "Did you wear these two white helmets for the robbery just now?" and he replied no. At that point of time he heard a policeman telling PW1 that a man carrying a white helmet and a plastic bag had been seen entering the house but he himself did not see this man enter. He knew the man as one of his friends by the name of Lai Sau Chin who used to visit him three to four times a week. That afternoon the police arrived at the house about half an hour after Lai's departure. The two white helmets were found only after the policeman had spoken to PW1 and after their recovery the police took the three of them to Tampoi Police Station. Between 8.00 p.m. and 9.00 p.m. the same day they were taken to the lock-up at the Johore Bahru Police Station. He was not fed that night as they arrived past dinner time. The next day at about 8.00a.m. he was given breakfast at the lock-up and then taken to a room where he was interrogated by several officers who took turns in this exercise. Each time he was interrogated by a group of two to five persons and the interrogation lasted until 8.00 or 9.00 p.m. when he was given a short break. He was not provided any lunch or water during that period although he asked for it. He was however allowed to go to the toilet. He was assaulted during interrogation. His interrogators punched him, beat the soles of his feet with rubber hose, hit his head with a rotan, stepped on his feet with their boots, beat his upper arms and back with a rotan and made him stand on one leg with his hands stretched out. At the end of this period of interrogation a rather kindly officer allowed him an hour to rest and requested him "to ponder and think properly as to where the gun was".

When this officer returned at the end of the hour he was asked where the gun was and when he replied that he did not know, another group of persons continued with his interrogation and he was again assaulted. He was interrogated further by one of them and also assaulted by this officer. He was asked to sit on the floor with his legs crossed and one of them kept jumping on his thighs. Later he was brought to another room where he was interrogated by a new batch of officers. It was in this room that at about 1 a.m. he told PW1 he knew where "the thing" was. He could not remember whether PW1 recorded this conversation or not but the statement attributed to him, "Saya boleh kasi keluar itu barang" was not correct. What he said was that he knew where the thing was. Nor did he say, "Saya simpan. Saya tahu." He did however say, "Kita pergi 3 pagi kerana sekarang ada banyak orang" and "Ada 2 barang". He said he knew where "the thing" was because he had actually seen where Lai kept the two revolvers. He had not seen the bullets in the small wrapping but he had been told by Lai that it contained bullets. These items were underneath the almeirah belonging to PW3 two weeks before his arrest. It was only after he had said, "Saya tau itu barang mana" and made a request for it that food was provided. After his meal at about 2 a.m. he was put in the first of two cars and just before his car left the police compound PW1 enquired, "Sekarang pergi mana?" He then asked PW1 to proceed to the house where he had been arrested. On arrival at the house they were let in by the wife of the chief tenant and PW1 knocked at the door of the second room. It was opened by PW3 who came out with his girl-friend. He was then escorted into the room by PW1 and two others. The door of the room was then closed and the policemen began their search. When PW1 asked him, "Mana itu barang?" he remained silent but pointed with his handcuffed hands in the direction of the almeirah. PW1 on pulling out a drawer and finding nothing inside it said, "Ta'dah". His hands by this time had been secured in front of him and he signalled with his hands for the drawer to be pulled out of the slot. PW1 did so and placed the drawer on the floor and he kept pointing in the same direction whereupon PW1 lay on the floor flat on his stomach to examine the slot but found nothing. He then gave a hand signal again and this time PW1 understood it and pulled out a piece of hardboard and saw the firearms inside the slot. PW1 then directed one of his policemen to fetch an implement to retrieve what was inside. The policeman came back with a spoon but was told to go and find a stick or chop-sticks. Photographs were then taken of the slot. The policeman came back with a solitary chop-stick and with the aid of this chop-stick PW1 took out the firearms. This whole exercise was performed in regard to the slot of the left drawer. Then the right drawer was pulled out and photographs were taken of the slot. The police recovered two packages from this slot - one larger than the other. The larger one was unwrapped and revealed motor-cycle number plates whilst the other identity cards and driving licences. None of the words in P2 was uttered by him during the period of half an hour or so when he was in the room with the police. From there he was taken back into police custody. Although he knew the firearms were kept in the second room he did not mention it to anybody. The door of the second room was always open. He only kept his personal belongings in the second room. Both he and Low did not sleep in the second room but outside in the hall or in the kitchen area on one of the two beds there.

In cross-examination the accused stated that on the day of the raid Lai, who was a friend of 10 years' standing, had dropped in at the house to see him. It was Lai who, having obtained his permission, kept the revolvers in the almeirah in the second room and it was Lai who chose the slot and also procured the piece of hardboard from the backyard of the house to conceal them from view. It was later on the day of the raid that Lai brought the two packages containing the motor-cycle number plates and the identity cards and kept them in the slot next to the one where the revolvers were placed.

PW3 who was recalled to give evidence under s. 425 of the Criminal Procedure Code corroborated the accused's evidence that there was in reality a person known as Lai Sau Chin who was a friend of his and of the accused and also that Lai used to visit them at the house but he denied having any knowledge of Lai's having kept anything in the second room. He admitted that Lai did come to the house at 7p.m. on the day of the raid and was told by PW1 to leave the scene during the period of surveillance of the house by the police.

The defence in a nutshell was a denial by the accused of the possession of the incriminating exhibits and an assertion that they were concealed by Lai in the slot of P3 in the second room which was easily accessible to anyone who was inside the house.

I considered the totality of the evidence and formed the view that the accused was not a truthful witness. I was satisfied beyond reasonable doubt that PW1 did not concoct the crucial words, "Saya boleh kasi keluar itu barang. Saya simpan. Saya tahu." which the accused denied having uttered. This statement started PW1 on his journey accompanied by the accused which resulted in the discovery of the incriminating exhibits. I had no reason to doubt that PW1 noted down those words of the accused on P2 after the interrogation. I did not believe the accused when he said that during the whole period that he was in the second room with PW1, PW4 and PW5 in the early hours of 7 December 1986 he did not utter a single word when the police officers were conducting their search. If his evidence relating to his interrogation was to be believed it would appear that not less than 10 policemen questioned him on the day following his arrest, a number too large to be credible. Further if the two revolvers had really been hidden in the slot of P3 not by him but by Lai, I found it incredible that he did not reveal this fact to the police during the period of remand especially when the offences with which he was charged carried the death penalty. His statement that the revolvers and bullets were found not in the slot of the right drawer but in that of the left drawer was also not true because a physical examination of the right drawer-slot of P3, which was no deeper than any ordinary drawer-slot, revealed the marking above the handle of the smaller revolver as shown in photograph P4B to be actually in that right drawer-slot. Further photograph P4F showing the left leg of P3 and the two paper packages inside the slot above it, one containing the motor-cycle number plates and the other the driving licences and identity cards, indicated without a doubt that the revolvers could only have been discovered in the right drawer-slot and not in the left drawer-slot as stated by the accused. In the result, having regard to the statements the accused made as recorded by PW1 in P2 which led to the discovery of the incriminating exhibits, I was in no doubt that the accused was in possession of the two revolvers and the ammunition as charged. I accordingly found him guilty and convicted him on the three charges and sentenced him to death.

Also found at [1990] 2 CLJ 288